BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACKIE C. LAMKIN Claimant	)	
VS.	)	
DILLARDS Respondent	)	Docket No. 1,049,094
AND	)	
FIDELITY & GUARANTY INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 28, 2012, Award entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson. The Board heard oral argument on March 22, 2013. Melinda G. Young, of Hutchinson, Kansas, appeared for claimant. Elizabeth Dotson, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The SALJ found claimant failed to prove by a preponderance of the credible evidence that it was more probably true than not true that claimant's retinal tears and retinal detachment arose out of and in the course of her employment with respondent.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues her retinal tear and subsequent detachment arose out of and in the course of her employment.

Respondent asks the Board to affirm the Award of the SALJ. In the event the Board finds claimant's condition arose out of and in the course of her employment, respondent argues claimant's impairment should be limited to a scheduled injury to her left eye.

The issues for the Board's review are:

1. Did claimant suffer an accidental injury arising out of and in the course of her employment with respondent?

2. If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant has worked for respondent since May 2001. She works in shipping and receiving, where she unloads trucks. She also performs other tasks, such as moving fixtures, shoveling snow, and doing housekeeping. On March 24, 2009, claimant was painting a wall in the men's department. She picked up a full 5-gallon bucket of paint, which she believed weighed from 42 to 43 pounds. When she stooped to pour the paint into a tray, she felt a sparkling sensation in her left eye. She stopped pouring and stood up, and the sensation subsided. She picked up the bucket of paint again, and when she stooped over again to pour, her eye started tingling and she saw the "sparkles" again. Again, they subsided. Claimant continued to work until the end of her shift, and then she went home. When claimant woke up the next morning, she could not see out of her left eye.

Claimant called the Grene Vision Group on March 25, 2009, and was told to come in immediately. She was seen by Dr. Scrafford, who told her she had a torn retina. Dr. Scrafford referred claimant to Dr. David Chacko, a board certified ophthalmologist with an emphasis in vitreoretinal surgery. Dr. Chacko saw claimant on March 26, 2009.

Dr. Chacko examined claimant's eyes and found she had decreased vision in her left eye. He diagnosed her with rhegmatogenous[1] retinal detachment and scheduled her for surgery the next day. Dr. Chacko said claimant's nearsightedness became worse after her surgery. Claimant said she had to change the prescription in her glasses three times. Claimant also had a small cataract on her left eye, which had been diagnosed a couple of years before her accident at work. After claimant's retinal detachment surgery, the cataract began to rapidly develop, and claimant underwent cataract surgery in November 2009. Dr. Chacko believed claimant's cataract development and need for subsequent surgery was caused by the retinal detachment. Claimant now complains of headaches. Dr. Chacko suspected claimant's headaches were related to her retinal detachment, which involved the fovea. Dr. Chacko said when the fovea is detached, eyesight cannot usually

[1] Dr. William Rosenthal said "rhegmatogenous" means there is a tear or a break in the retina.

get back to 20/20 and eye strain and not being able to see well could contribute to tension headaches.

Dr. Chacko was not aware on his first evaluation of claimant that she was alleging any type of work-related cause for her condition. He initially believed claimant's retinal tear was spontaneous. On March 23, 2010, Dr. Chacko wrote respondent's carrier stating:

> I feel that usually retinal detachments occur spontaneously and are not due to head trauma. Severe head trauma incurred by occupations such as boxing or soccer where they do headers can cause retinal tears. I can say with some reasonable medical certainty that I do not feel that this [claimant's retinal detachment] was caused by occupational trauma.[2]

Dr. Chacko said people are born with a gel in the eye made of protein and water. No more gel is made after birth. The gel becomes diluted because the eye still produces water. If the concentration gets too diluted, the gel will not maintain its shape and collapses. This collapse causes separation of the vitreous face from the retina. If the retina is too tightly attached to the vitreous face, then a retinal tear can occur which may or may not result in a retinal detachment. Dr. Chacko said liquefaction of the vitreous gel and the events following are a naturally-occurring process.

Dr. Chacko said symptoms of a tear are new onset floaters. Sometimes people see something like smoke in the eye. Some people have photopsias, which are flashing lights. But he added that the symptoms, floaters and flashing lights, are fairly common and only about 5 to 10 percent of people with those symptoms will actually have a torn retina. Dr. Chacko said if a person has a tear already, bending over might make the symptoms increase.

Dr. Chacko said in May 2010, claimant told him she started experiencing flashing lights after she picked up a bucket of paint and bent over to pour.[3] Dr. Chacko testified:

> . . . what I can say with some degree of certainty is that if she were experiencing flashing lights and floaters that occurred after she picked up something heavy, then there is–there is a possibility that she tore the retina at that time, and if you tear the retina, then it takes awhile for the–because the retina's actually pumping fluid, to go from a retinal tear to a detachment takes a little time, and that varies in every patient.[4]

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[2] Chacko Depo., Ex. 4.

[3] Dr. Chacko admitted claimant could have given him that information earlier, during his treatment of her condition, but he did not write it down in the records because at the time causation was not important in his treatment of her retinal detachment.

[4] Chacko Depo. at 39.

Dr. Chacko said after listening to claimant's history, he believed the actual detachment occurred in the late hours of March 24 or morning hours of March 25. Dr. Chacko said it was possible the occupational event on March 24 could have caused her retinal detachment. On October 31, 2010, Dr. Chacko wrote claimant's attorney and stated:

> Jackie [claimant] was a patient of mine who underwent repair of retinal detachment on March 27, 2009, in the left eye. She had two retinal tears in the left eye with a fovea-off detachment. She states that this occurred at work while she was lifting heavy paint. Although vitreous detachment is usually spontaneous, strenuous activity or trauma to the head can precipitate a vitreous detachment which can cause a retinal tear so I cannot rule out the possibility that this was not work related.[5]

However, Dr. Chacko testified he could not say within a reasonable degree of medical certainty that smoothly lifting a 5-gallon bucket of paint caused claimant's retinal tear. He could not say it was more probably true than not true that lifting the bucket caused the retinal tear, but he said claimant's history of getting sparkles when lifting the bucket made it possible the retinal tear occurred at that point.

Dr. Pedro Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations. Dr. Murati has no training in ophthalmology or optometry. He sees no patients for ophthalmological or optomic conditions. He examined claimant on July 8, 2010, at the request of claimant's attorney. Claimant complained she suffered headaches above her left eye, she had right eye strain more due to her left eye being injured, and the sight in her left eye was blurry. Claimant said she was unable to see a computer screen well and driving was difficult. Claimant gave a history of stooping over to pour paint from a full 5-gallon bucket when suddenly feeling tingling and seeing sparks floating around in her left eye. She put her hand over her eye and it began to feel better, so she bent over to start painting, and the tingling and sparks came back. When claimant awoke the next day, she was unable to see out of most of her left eye.

Dr. Murati performed a fundoscopy examination, which was normal. He noted claimant's pupils were equally reactive to light and accommodation. Dr. Murati diagnosed claimant with status post retina detachment with repair and post traumatic cataract repair. He opined that her diagnoses were secondary to a direct result of the work-related injury that occurred in March 2009.

Dr. Murati does not have the visual acuity test charts in his office. He does not have training or expertise to do the visual field testing. He does not have refraction equipment in his office. He did not perform a fields of vision test and said he relied on medical records which had been provided to him by claimant's attorney that showed 20 percent of claimant's

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[5] Chacko Depo., Ex. 5.

visual fields were gone. Using the AMA *Guides*,[6] Dr. Murati rated claimant as having a 5 percent permanent partial impairment to the whole body for loss of visual fields. Dr. Murati said that there is no left eye impairment in the AMA *Guides*.

Although claimant complained of headaches, Dr. Murati was not asked to provide a rating for the headaches. However, he believes it is more probable than not that claimant's headaches are related to her eye condition. Dr. Murati did not take a history of the frequency or duration of claimant's headaches. He said if the headaches interfere with the activities of daily living, it would be a rateable condition as defined by the AMA *Guides*. Dr. Murati has no information as to whether claimant's headache interfere with the activities of daily living. Dr. Murati said his usual rating for a headache condition is 3 percent. That rating would combine with his rating for claimant's loss of visual fields for a total 8 percent permanent partial impairment to the whole body.

Dr. Murati's only restriction was that claimant avoid any work that required acute vision. He reviewed a task list prepared by Dr. Robert Barnett.[7] Of the 21 tasks on the list, Dr. Murati opined claimant was unable to perform 16 for a 76 percent task loss.

Dr. Murati said it was well-known and accepted that trauma to the head or eye can cause retinal detachments, but it is not as well known that exertion can cause retinal detachments, especially for people who have myopia. Dr. Murati said it has been postulated that the increase in intraocular pressure that happens with heavy lifting can cause retinal detachment. Dr. Murati referred to the report entitled *Physical Exertion (Lifting) and Retinal Detachment Among People With Myopia*.[8] Dr. Murati testified this report was a learned treatise and was sufficiently authoritative in its field.

Dr. William Rosenthal is a ophthalmologist with a subspecialty in diseases and surgery of the retina, vitreous and macula. He is board certified by the American Board of Ophthalmology. Dr. Rosenthal performed an examination of claimant on February 28, 2011, at the request of respondent.

Claimant gave Dr. Rosenthal a history that she experienced "flashes and sparkles in her left eye" upon lifting a 5-gallon container of paint at her place of employment. Claimant told him the flashes and sparkles lasted from two to three minutes and then

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[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Robert Barnett, Ph.D., is a clinical psychologist who also holds credentials as a rehabilitation counselor. He interviewed claimant by telephone on October 14, 2010, at the request of claimant's attorney, after which he prepared a list of 21 tasks that claimant had performed in the 15-period before her work-related injury.

[8] Dr. Chacko testified this article was not conclusive and the Journal in which it was printed was not one related to his field and not one he would have read.

subsided. Claimant noticed a second episode later, and then had no further symptoms until the next day when she woke up and her vision was gone. Claimant was found to have a retinal tear and a retinal detachment that necessitated surgical intervention. Claimant later underwent cataract surgery with an intraocular lens implantation in the same eye. Claimant told Dr. Rosenthal she has had numerous headaches in her right eye occurring three to four times per week during the last year.

Dr. Rosenthal said the procedure to repair claimant's retinal detachment was highly successful. The retina was attached, the scleral buckle and associated ocular indentation was appropriate, and the eye looked stable, other than there was persistent cystic change in the macula. He recommended the cystic change in the macula be evaluated and perhaps treated to yield improvement in visual acuity and function. Dr. Rosenthal said macular edema can be related to the initial retinal detachment, to the surgical repair, and residual postoperative swelling and is not necessarily caused by macular degeneration.

Claimant told Dr. Rosenthal she had not received any type of traumatic injury to her eye and experienced no jarring or jolting body or head movements. Dr. Rosenthal asked claimant about her headaches. He said the symptoms of photopsia, sparkling or twinkling lights, extending over minutes was highly suggestive of a vascular component. He said another etiology for photopsia is vitreoretinal traction.

Dr. Rosenthal opined that it would be highly unlikely the activities claimant described would lead to rhegmatogenous retinal detachment. He explained that rhegmatogenous retinal detachment is a condition that develops as a result of changing intraocular forces, particularly the interface between the vitreous and the retina. Trauma can result in that type of force, but it would require a trauma that involved significant G-force. It would require an extensive jarring or jolting. The simple act of lifting a load does not create that type of change in force. Dr. Rosenthal testified the vast majority of individuals that develop retinal detachment develop it as a result of vitreous liquefaction not associated with trauma.

Dr. Rosenthal said the AMA *Guides* set out extensive and comprehensive criteria to rate permanent impairment of eyes. He said the *Guides* are very specific as to what type of testing should be done, the amount of illumination that must be present, and which instrumentation must be used. The *Guides* also set out criteria for evaluation and functionality of binocular vision. Also to be considered in the rating is whether the patient had surgery, has cataracts, or has glaucoma. In order to perform the examination as outlined in the AMA *Guides*, one would need all the instrumentation and equipment and would have to have experience in how to apply the information to the appropriate charts, graphs and schemes. Dr. Rosenthal said it would be unlikely a family doctor or physiatrist would have the equipment needed or the level of expertise to be able to perform the examination.

Dr. Rosenthal admitted he had done only one independent medical examination in the last 10 years. He does not do disability determinations. Less than 10 percent of his

practice deals with occupational injuries, and in those situations someone had been hit in the eye or something of that nature. He had reviewed the AMA *Guides* years ago but has not applied them to injuries on any regular basis. His explanation of what is required in the AMA *Guides* in arriving at an impairment is based on his review of Chapter 8 of the *Guides*.

Dr. Rosenthal believes claimant's retina detached as a result of a condition in her eye that preexisted the detachment itself. He believes the liquefaction of the vitreous gel reached a point where there were tractional forces that gave rise to the retinal tear, and the detachment developed as a result of the break in the retina. Dr. Rosenthal said the sparkler sensation claimant described when she bent over while holding the five-gallon bucket of paint was not when the retina was detaching; the detachment had nothing to do with those symptoms.

Dr. Rosenthal stated rhegmatogenous retinal detachment concerns physical forces inside the eye. The bending act that claimant described indicates there were changes in blood flow. Claimant could have been exhibiting a Valsalva maneuver or action. Claimant was changing intracranial pressure, intraocular pressure, and systemic blood pressure when she bent over, which can result in the types of scintillating scotoma that she described, as well as the sparklers and visual changes. When she went back to the upright position, the Valsalva maneuver was terminated, and the normal blood flow returned to the eye. The type of phenomena where there is interruption of blood flow either to the visual centers of the brain or the eye is the same type of symptomatology often seen in vascular headache.

Dr. Rosenthal agrees that claimant had a detached retina but stated the tearing of the retina is not directly correlated to the symptoms claimant described. Photopsia, or seeing lights, is not the symptom one would experience with retinal detachment. The symptom experienced with retinal detachment is loss of visual field. Dr. Rosenthal also said it would be an appropriate assumption that claimant suffered the detachment sometime before waking up the morning of March 25 and recognizing a loss of visual field. He said it was a complete coincidence that the retinal detachment occurred after the sparkler sensations claimant experienced the day before.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

K.S.A. 44-510d(a) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> (17) For the loss of an eye, or the complete loss of the sight thereof, 120 weeks.
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[9] K.S.A. 2010 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[11] *Id.* at 278.

> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Analysis

The SALJ has provided an excellent summary and analysis of the facts giving rise to this appeal. The Board agrees with the SALJ's conclusions related to whether the claimant's detached retina resulted from an injury arising out of and in the course of her employment with respondent.

Two board certified ophthalmologists testified in this case. Dr. Rosenthal examined claimant at the request of respondent. Dr. Chacko performed surgery and treated the claimant for the detached retina. The SALJ is correct in giving less weight to the opinions of Dr. Murati. Dr. Murati is not an ophthalmologist and the question of causation in this case requires the opinion of an ophthalmologist.

Dr. Rosenthal opined that it would be highly unlikely the activities claimant described would lead to rhegmatogenous retinal detachment. Basically, the type of retinal detachment experienced by clamant would require trauma that involved significant G-force. Dr. Rosenthal testified the simple act of lifting a load does not create that type of change

in force. Dr. Rosenthal believes claimant's retina detached as a result of a condition in her eye that preexisted the detachment itself.

The best evidence in support of a claim that claimant detached a retina while bending over and lifting a bucket is the testimony of Dr. Chacka. Initially, in a letter to the respondent's insurance carrier dated March 23, 2010, Dr. Chacko wrote: "I can say with some reasonable medical certainty that I do not feel that this [claimant's retinal detachment] was caused by occupational trauma."[12] In a letter to claimant's attorney, Dr. Chacko wrote: "Although vitreous detachment is usually spontaneous, strenuous activity or trauma to the head can precipitate a vitreous detachment which can cause a retinal tear so I cannot rule out the possibility that this was not work related."[13]

In his deposition, Dr. Chacko agreed that he had indicated it was possible the retinal detachment was related to the injury as described by claimant. However, Dr. Chacka would not agree that it was more probable than not the incident of lifting the bucket caused the retinal detachment. In summary, Dr. Chacko's testimony supports, at best, that claimant's retinal detachment may have possibly been related to the injury.

Possible is not the standard.[14] The burden of proof is whether it is more probably true than not, and this record does not meet that statutory requirement. The Board finds claimant has failed to prove by a preponderance of the evidence that she suffered a retinal detachment as the result of her alleged work injury.

CONCLUSION

The Board finds claimant has failed to prove by a preponderance of the evidence that she suffered a retinal detachment as the result of her alleged work injury. All other issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge C. Stanley Nelson dated December 28, 2012, is affirmed.

IT IS SO ORDERED.

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[12] Chacko Depo., Ex. 4.

[13] Chacko Depo., Ex. 5

[14] *Fenglin Shi*, Docket No. 213,957, 2001 WL 403291 (Kan. Work. Comp. App. Bd. Mar. 29, 2001).

Dated this _____ day of April, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
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